

**Martel Construction, Inc. and Western Montana Area District Council of Carpenters, affiliated with United Brotherhood of Carpenters and Joiners of America and International Union of Operating Engineers Local No. 400, affiliated with International Union of Operating Engineers, AFL-CIO.** Cases 19-CA-20435 and 19-CA-20436

April 15, 1991

# DECISION AND ORDER REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND DEVANEY

On June 28, 1990, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a motion to correct and clarify the administrative law judge's decision and an answering brief. The Respondent then filed a brief in reply to the General Counsel's answering brief and the General Counsel filed a clarification of its answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

As a defense to the 8(a)(1) and (3) charges that it had dismissed crane operator Ray Waliser and carpenter Robert Williams about July 14, 1989,<sup>1</sup> for their refusals to cross a picket line maintained by their respective unions, the Respondent contended at the hearing that the alleged discriminatees were engaged in unlawful secondary picketing and that their conduct was thus not protected by the Act. To support that contention, the Respondent attempted to introduce evidence to show that the Unions had improperly picketed its reserve gate.<sup>2</sup> The judge rejected this defense at the time it was raised and refused to allow the Respondent to introduce the proffered evidence, stating in effect that the validity of the Respondent's reserve gate system had no bearing on whether the discriminatees had been unlawfully discharged. The Respondent has excepted to these rulings of the judge. We find merit to those exceptions.

In *Warwick Caterers*, 269 NLRB 482, 483 (1984), the Board held that a respondent is not precluded from raising, and having considered, the substance of a dismissed charge as a defense to an unfair labor practice

complaint. In so holding, the Board stated "that allowing the Respondent to present its defense is not tantamount to reviewing the General Counsel's decision not to issue a complaint," and "that the General Counsel's prior consideration and investigation of the earlier charge . . . cannot . . . serve as a replacement for the Board's adjudicatory responsibility." We find *Warwick* to be on point. If the judge had allowed and considered the Respondent's defense and evidence relevant to it and found that it had merit, not all elements of the alleged 8(a)(1) and (3) violations would have been established. Therefore, we shall remand this proceeding to the judge to reopen the hearing and take such evidence as is material and relevant to the litigation of the Respondent's defense pertaining to the alleged illegality of the Unions' picketing. Thereafter, the judge shall consider what effect, if any, that defense has on his findings and conclusions that the Respondent unlawfully terminated the alleged discriminatees.

In light of this remand on the 8(a)(1) and (3) issues, we find it premature at this time to rule on the Respondent's other exceptions.

## ORDER

The National Labor Relations Board orders that this proceeding be remanded to Administrative Law Judge Burton Litvack, who shall reopen the hearing and take evidence related to the Respondent's defense concerning the Unions' alleged illegal secondary picketing and, thereafter, consider the effect, if any, of that defense on his findings that the Respondent has engaged in unlawful conduct. The judge shall arrange and give notice of that hearing.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and a recommended Order in light of the Board's remand and on consideration of the Respondent's defense. Following service of such supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

*Michael S. Hurtado, Esq.*, for the General Counsel.  
*Donald C. Robinson, Esq. (Poore, Roth & Robinson, P.C.)*,  
of Butte, Montana, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charge in Case 19-CA-20435 was filed by Western Montana Area District Council of Carpenters, affiliated with United Brotherhood of Carpenters and Joiners of America (Carpenters Union), on July 20, 1989,<sup>1</sup> and, on the same date, the unfair labor practice charge in Case 19-CA-20436 was filed by International Union of Operating Engi-

<sup>1</sup> All dates are in 1989 unless otherwise specified.

<sup>2</sup> In its reply brief, the Respondent notes that it had filed a charge on July 18, 1989, alleging that the Unions had engaged in illegal secondary picketing commencing about July 13. That charge was subsequently dismissed by the Regional Director.

<sup>1</sup> Unless otherwise stated, all events occurred during calendar year 1989.

neers Local No. 400, affiliated with International Union of Operating Engineers, AFL-CIO (Operating Engineers Union). Having investigated both matters, the Regional Director for Region 19 of the National Labor Relations Board (the Board), on August 17, 1989, issued an order consolidating the above-captioned cases and a consolidated complaint, alleging that Martel Construction, Inc. (Respondent) engaged in conduct violative of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent timely filed an answer, denying the commission of the alleged unfair labor practices. Having been scheduled for hearing, a trial was held before me in Bozeman, Montana, on November 16, 1989. At the hearing, all parties were afforded an opportunity to offer into the record any relevant evidence, to examine and cross-examine all witnesses, to argue their legal positions orally, and to file posthearing briefs. Both parties filed the latter documents which have been closely examined. Accordingly, based on the entire record here, including the posthearing briefs and my observations on the testimonial demeanor of the witnesses, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent is a State of Montana corporation, with an office and place of business in Bozeman, Montana, and is engaged in business as a general controller in the building and construction industry. During the 12-month period immediately preceding the issuance of the instant consolidated complaint, during the normal course and conduct of its business operations, in the State of Montana, Respondent purchased and received goods and products valued in excess of \$50,000, directly from sources located outside the State. Respondent admits that, at all times material, it has been, and is now, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATIONS

Respondent admits that the Carpenters Union and the Operating Engineers Union are labor organizations within the meaning of Section 2(5) of the Act.

##### III. ISSUES

The consolidated complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by terminating employees Raymond Waliser and Robert Williams on or about July 17, 1989, and Section 8(a)(1) of the Act by threatening employees with discharge and discontinuance of future employment unless they nonaffiliated themselves with any labor organization. Respondent denied commission on the alleged unfair labor practices.

#### IV. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Facts*

Respondent is engaged in business as a general contractor in the building and construction industry in the State of Montana. The record establishes that the Company was formed by William Martel and his father in 1960; that Martel became president of the corporation in 1975, that Anthony Martel, the son of William, is a project manager for Re-

spondent and treasurer of the corporation; and that, up until 1988, Respondent and various labor organizations, including the Carpenters Union, the Operating Engineers Union, and the Laborers Union, had successive collective-bargaining agreements. In that year, negotiations for a new contract concluded with the labor organizations filing an unfair labor practice charge with the Board, alleging that Respondent unlawfully refused to execute a successor agreement. A complaint against Respondent issued, and, while the case was pending before an administrative law judge, in early April 1989, Respondent commenced work on a multimillion-dollar project, a Federal reserve bank building, in Helena, Montana. Without a collective-bargaining agreement in effect, Respondent decided to perform the Federal reserve bank building project on a nonunion basis and hired employees without regard to union affiliation.<sup>2</sup> Approximately 3 months after the commencement of the project and while the above unfair labor practice case remained pending before the administrative law judge, on July 13, representative of the Laborers Union, the Carpenters Union, and the Operating Engineers Union began picketing outside the Federal reserve building jobsite with placards reading, "On Strike Due To Unfair Labor Practice Martel Construction."<sup>3</sup>

Two of Respondent's employees on the Federal reserve bank building project were Raymond Waliser, a crane operator, and Robert L. Williams, a carpenter. The record reveals that Waliser is a longstanding member of the Operating Engineers Union; that he has worked for Respondent on numerous construction projects since March 1985; that Anthony Martel and he are good friends; that Waliser specializes in operating Respondent's Grove crane, a small, highly maneuverable crane which can be easily moved from place to place on a construction jobsite; that, notwithstanding his union membership, Waliser has, in the past, worked on nonunion projects for Respondent; and that Waliser, on one occasion, continued to work for Respondent on a jobsite despite ongoing picketing.<sup>4</sup> The record further reveals that Waliser was offered the opportunity to work for Respondent on the Federal reserve bank building project by Anthony Martel, who told the former that the job would be nonunion; that Waliser was aware at the time of the job offer of the dispute between Respondent and the Unions over the existence of a collective-bargaining agreement; that the Operating Engineers Union gave its permission for Waliser to work on the construction project conditioned on his agreement "to promote unionism among the work crew"; and that he began working on the Helena jobsite for Respondent on April 27. According to Waliser, his job on the project was to "basically run the cranes and other equipment that was on the job." The record discloses, as to Williams, that he telephoned Anthony Martel

<sup>2</sup>It is not in dispute that Respondent hired both union and nonunion employees to work on the project.

<sup>3</sup>As will be discussed in full, the picketing continued on an intermittent basis through the first 2 weeks of August, and, at one point, leaflets were distributed by the pickets. The documents, R. Exh. 8, set forth the "main reason" for the picketing as follows: "last year Bill Martel negotiated and reached a labor agreement with a number of unions. Afterwards, he refused to sign the agreement, which is against the law. The unions filed charges through the [Board]. The NLRB found Martel guilty! But instead of settling with the unions, Martel appealed the . . . decision to an administrative law judge in San Francisco."

<sup>4</sup>The construction project was also in Helena. The job was a union job during 1987; the picketing was by the Plumbers Union; and no other crafts honored the picket line.

about working on the Federal reserve bank building project in late April or early May. Williams, who is a member of the Carpenters Union, testified that he believed Martel was aware of his union affiliation inasmuch as the latter said that he (Williams) might not want the job given its nonunion basis. Nevertheless, having previously informed a Carpenters Union business agent of his willingness to work on a nonunion basis in order to obtain jobs, Williams applied to work for Respondent at the Helena jobsite and, in May, was hired by Clarence (Clancy) Gaworski, Respondent's project superintendent,<sup>5</sup> to work on a carpenter crew.

Raymond Waliser testified that he arrived at the Helena jobsite on Thursday, July 13 at approximately 8 a.m. and observed three pickets, who he recognized as business agents of the Operating Engineers, Laborers, and Carpenters Unions, carrying the placards described above.<sup>6</sup> According to the alleged discriminatee, who was the only crane operator on the project at the time, two of the pickets, Jack Ball of the Operating Engineers Union and an individual from the Laborers Union, approached and asked him not to cross the picket line.<sup>7</sup> He told them that he would not cross, and the union officials responded that they were there to protest unfair labor practices. Thereafter, Waliser remained at the picket line for 30 minutes, speaking to the union business agents. At one point, the laborer foreman for Respondent, Lester Rada, walked off the jobsite and over to where Waliser was standing; Rada asked what he intended to do, and "I told him I was not going to cross [the picket line]." Thereupon, Waliser, who observed, just one other employee, Robert Williams, refuse to enter the jobsite, left the area at approximately 8:30 a.m. and drove to his home.

Waliser testified further that, at approximately 11 a.m., Clancy Gaworski telephoned him and "asked if I would be reporting to work. I told him so long as the picket lines were up, I would not." Gaworski said "okay," and the conversation ended.<sup>8</sup> Four hours later, at approximately 3 p.m., Anthony Martel telephoned Waliser, and "he mentioned how good the company had been to me . . . and they'd kept me busy. And he asked me . . . why I wouldn't go to work. And I told him the pickets were up. And he asked me which side of the fence I'd be on. I told him I'd be on the outside of the fence so long as picket signs were up. And he mentioned that I would have a job so long as they had cranes if I decided to come back to work." Anthony Martel, who testified that Waliser had been an "excellent operator" of Respondent's Grove crane and had operated it 95 percent of the times Respondent had utilized it, that he has long been aware of Waliser's union membership, that the latter had worked nonunion jobs for Respondent in the past and never expressed any concern about doing so, that Waliser was al-

ways well compensated by Respondent on the occasions he worked on nonunion projects, and that, on nonunion jobs, Waliser's union membership never was an issue with Respondent, stated that he was in Nevada when the picketing began at the Helena project. Informed of Waliser's refusal to report for work and believing he had no objection to working nonunion, Martel telephoned Waliser and said (Martel) was confused as to why the former would refuse to enter onto the Helena jobsite because of picketing when he had been a "good company employee for the last 5 years." Waliser replied that "he had grown up around those guys that were in Local 400 and he said he just didn't feel right crossing the picket line." Martel responded that Respondent had always taken care of him, had always made concessions for him in the past, "and I was just surprised to see him change his tune all of a sudden." Waliser replied that he wouldn't work if the picketing continued on the project. Martel then indicated that, as long as Respondent operated the Grove crane, Waliser could have a job with Respondent. During cross-examination, Martel conceded having "essentially" asked Waliser what side of the fence he was on. "I wanted to know if he was on our side . . . in spite of pickets."<sup>9</sup>

On Friday, July 14, Waliser drove to the jobsite and arrived at 7:50 a.m. Observing the picketing continuing, he remained there for 15 minutes and, then, drove home. At 10 a.m., Gaworski telephoned him, and "he asked me again if I was coming back to work. And I told him that the picket signs were still up . . . and so long as they were up, I would not cross them." Gaworski agreed that such a conversation occurred and that Waliser reiterated his refusal to work during the picketing. With regard to other employees, Waliser believed that, of Respondent's work force, only he and Williams honored the picket line.

Waliser and his wife were away during the weekend. On Monday, June 17, he arrived at the jobsite at 7:50 a.m., observed no picketing, entered onto the construction site, and walked over to the office trailer, in which Gaworski was working. They greeted each other, and, according to Waliser, "I asked Clancy if there was work. And he asked if I had received the letter from Martel Construction." Waliser said he had not and asked about its contents. "And he said in the letter that if I would not affiliate with the unions, there would be work for me. So long as I wanted to stay with the unions, there was no work." Waliser replied that, at the time, he did not want to give up his union card and requested a layoff card. After Gaworski said that the office would send him one, Waliser said "they could put fired or laid off . . . I did not quit." Because according to the letter they made the decision for me." After a brief discussion of Waliser's pension rights, the conversation, which lasted no longer than 5 minutes, ended. Gaworski, who assertedly decided to terminate Waliser on Friday, July 14 after again being told by the latter that he would continue to honor the picket line at the Helena jobsite and informed William Martel of his decision, testified that the employee entered his office trailer at the jobsite "just a few minutes" before 8 a.m. on Monday, and stated his willingness to work. He (Gaworski) asked if Waliser would be there full time or not. "And he said if there's pickets up tomorrow, he wouldn't cross the picket line. I says that wouldn't do. We need somebody we can

<sup>5</sup> Respondent admitted that William Martel, Anthony Martel, and Gaworski are supervisors and Respondent's agents within the meaning of Sec. 2(11) and 2(13) of the Act.

<sup>6</sup> That the unions' picketing began on this day does not appear to be coincidental. Thus, according to William Martel, the project was "entering a critical phase. We had large concrete pours that were scheduled and . . . the disruption of the project would be substantially more significant than it would have been in April. . . ."

<sup>7</sup> As the only crane operator on the project, Waliser understood that his presence was critical to the concrete pour inasmuch as the Grove crane would be utilized to hoist buckets of wet concrete.

<sup>8</sup> Gaworski admitted telephoning Waliser, with the latter saying "he wasn't going to cross the picket lines."

<sup>9</sup> Martel averred that "it didn't matter to me whether he was union or not." He added that he "was a little disappointed" in Waliser for suddenly causing a problem on a nonunion job.

count on, not here one day and gone for two.” The alleged discriminatee requested a layoff slip so he could know where he stood. Gaworski replied, “Well, you didn’t show up for 2 days and as far as I’m concerned you’re terminated.” During cross-examination, Gaworski could not recall referring to a letter and averred that he would have changed his mind about terminating Waliser if the latter would have agreed “to be there full time no matter what happened outside.”

After speaking to Garworski, Waliser left the construction site and drove to his local post office in order to pick up his Saturday mail. There, he discovered a letter, General Counsel’s Exhibit 2, signed by William Martel and dated July 14.<sup>10</sup> The document reads as follows:

Dear Ray:

Your decision not to work for Martel Construction, Inc. is extremely disappointing to me.

In the years of your employment with Martel Construction, I believe we have treated you with respect and have shown our gratitude for your talents and loyalty with monetary compensation and steady employment.

I, therefore, am asking you to reconsider your decision. Your employment with Martel Construction is contingent upon a non-affiliation with any union.

I hope and I am certain you will consider the job security and our past relationship in reaching your decision.

After going to the post office, Waliser, believing that the enclosed check signified his termination, applied for state unemployment compensation payments.

Later that day, during the afternoon, Gaworski again telephoned Waliser from his office trailer and asked if the alleged discriminatee had made a decision. Waliser replied “that so long as the signs were up, I would not cross.” At that point, William Martel came on the line, and he and Waliser spoke for approximately 15 minutes. According to the latter, Martel said “he didn’t want to see me go” and asked “what it would take to keep me.” Waliser replied, “wages, insurance, and a pension. His response . . . was . . . he could not meet the pension part of it.” The subject of unions arose, with Martel asking why Waliser would not cross the picket line. The latter responded that he could not do so and said he hoped Martel would execute union contracts for this project. Martel answered that he would not “unless the law required him to do so.” During cross-examination, Waliser stated that he understood that William Martel wanted him back on the job, that, if the conditions were right, he might have considered returning to work despite the picketing;<sup>11</sup> and that Martel said nothing to him about having to drop his union membership in order to continue working. William Martel,<sup>12</sup> who asserted that General Counsel’s Ex-

hibit 2 was “my attempt . . . to get Ray Waliser back on the job and that disaffiliation would have been to the alleged discriminatee’s benefit as ‘he would not put himself in a position of being fined’ and as he would be more dependable as a worker, testified, as to the conversation, stating it constituted no more than his further efforts to persuade Waliser to work. To this end, according to Martel, he attempted to express his understanding of Waliser’s “predicament,” stating that he wanted Waliser to decide to remain an employee. Martel says that he emphasized to Waliser that “I need him as a full time employee, that it was impossible for him to be put in a position that would question his employment,” and “I told him the door was open, that I would reinstate him . . . he said he would think about it.” According to Martel, he did raise the subject of Waliser’s union membership, saying “the easiest way for him not to be in violation of their [constitution] and his obligation to them . . . since we were non-union” was for him to drop his membership. Asked, during cross-examination, about any discussion of the July 14 letter, Martel said that he merely asked if Waliser had received it; Waliser said that he had. Finally, asked if anything was said to Waliser about relinquishing his union membership as a condition prior to reinstatement, Martel replied, “I don’t think we talked in those real specifics on the 17th.”

The next day, Tuesday, July 18, Respondent hired another crane operator and responded to Waliser’s claim for unemployment compensation as follows: “Claimant was given an opportunity to continue working for Martel Construction, Inc. at the same wage rate, but without union affiliation. He refused to work under that policy. He, therefore, quit and left the jobsite on Monday, July 17, 1989.”<sup>13</sup>

Robert L. Williams testified that, as usual, he reported to the Federal reserve building construction jobsite in Helena at approximately 7:30 a.m. on July 13 and relaxed prior to the normal 8 a.m. starting time. A few minutes later, he observed an Operating Engineers Union business agent commence walking with a placard. Williams approached, asking what the picketing was about and how many building trades unions were involved. When the business agent said that the Laborers Union and the Carpenters Union were also involved, “I told [him] at that time that I would not cross their picket line.” According to Williams, he remained standing outside the jobsite for an hour and observed all of Respondent’s other employees, except Raymond Waliser, cross the picket line into the project. He added that, at one point, Respondent’s laborer foreman came to the project fence, and he (Williams) told the foreman that he would not cross the picket line. Eventually, Williams went home. The next day, Friday, July 14, Williams again drove to the jobsite, observed that the pickets were “up,” and after a few minutes, “went home.” The alleged discriminatee had no contact with Respondent until the next day, Saturday, July 15, when he received two checks, covering “the last two weeks, the week

<sup>10</sup>Included with the letter was Waliser’s paycheck for the previous week. He stated that such was unusual inasmuch as he normally would not have received that week’s paycheck until the next Thursday.

<sup>11</sup>Later, Waliser agreed that he would not have reported to work while pickets were stationed at the Helena jobsite but, under recross-examination, affirmed his original position—that, dependent upon Martel’s offer, he would have considered crossing the picket line.

<sup>12</sup>Martel testified that Gaworski spoke to him that afternoon and “suggested that I should probably make one more attempt to talk to Ray” and put him

back to work “if he indicated he would still be willing to work . . . every-day.”

<sup>13</sup>William Martel drafted and signed this reply, G.C. Exh. 3, to the State of Montana’s Unemployment Compensation Benefits Bureau. Asked if he merely copied what was in his July 14 letter, Martel said, “The same thought was in my mind. Ray left the jobsite, refused to come back to work in spite of my offer for reinstatement.”

preceding the strike and the partial week of the strike, every day that I had worked.”

William testified that he arrived at the jobsite on Monday, July 17 at 8 a.m., saw no pickets, and entered the construction area. After speaking to two employees for approximately an hour, Williams walked over to the office trailer, entered, and spoke to Clancy Gaworski. Curious about his job status after receiving the two paychecks on Saturday, Williams asked Gaworski if he continued to have a job, adding that he understood receiving checks in the mail normally meant layoff or termination. Gaworski asked “what do you think it means,” and Williams responded, “I don’t have a job.” Unable to recall who raised the subject, Williams stated that they next discussed unions with Gaworski describing his union experience and experience with Respondent and saying “that this was indicative that you’re just better off sticking with an employer instead of with the Union because Martel had . . . steady employment.” Gaworski added that the Helena project was “a non-union project” and that “union people should be on union jobs.” According to Williams, while he inferred from the conversation that he had been terminated, Gaworski never actually said so. Gaworski, who admitted being aware that Williams had been honoring the picket line, testified that he decided to terminate him on Friday, July 14, and instructed Respondent’s payroll office to remit final checks to him. As to their conversation on Monday, Gaworski remembered little except that “I think he wondered if he still had a job. . . . I told him no. During cross-examination, he recalled telling Williams that the Helena project was “a non-union job” and did not deny saying that union men should be working on union jobs, adding “union men [wouldn’t] want to work for us.” Finally, Gaworski testified that he replaced Williams with another carpenter prior to their conversation on Monday.

With regard to Respondent’s defense to the unfair labor practice allegations involving Williams and Waliser, its position appears to be less than certain. Thus, as set forth above, the response to Waliser’s unemployment compensation claim was that he “quit” his employment. This assertion is echoed in Respondent’s “Third Defense” in its answer to the consolidated complaint, dated August 30, 1989, wherein counsel stated, “The employees Robert Williams and Raymond Waliser voluntarily terminated their employment because they elected to honor picket lines which had been erected . . . at [the] Helena jobsite . . . and therefore refused to return to work on the Respondent’s project.” In contrast to the foregoing, Clarence Gaworski, Respondent’s project superintendent at the Helena project and the individual in apparent overall supervision at the jobsite, testified that Waliser and Williams were, in fact, terminated; that he personally made the decision to fire each of them on Friday, July 14; and that he thereafter informed William Martel of his decisions. Finally, further confusing the record as to the basis for Respondent’s defense is its counsel’s assertion, at the trial and in his posthearing brief, that Williams and Waliser “were treated,” by Respondent, “as economic strikers who were subject to replacement by employees who would in fact work irrespective of whether pickets were on the project.”

With regard to Gaworski’s testimony that both alleged discriminatees were terminated, he stated that their honoring the picket line “didn’t have anything to do with [his] reason for terminating them. I’ll give an employee one chance, and

if they don’t show up for work and leave me short handed, they’re gone.” He added, as to both, that Thursday was “strike one. And then Friday I figured was strike two.” Moreover, both Anthony and William Martel maintained that their employees’ union affiliation or lack thereof made no difference to them. According to the former, referring to Waliser, “it didn’t matter to me whether he was union or not.” His father testified that, at the commencement of the Federal reserve bank building project in April, he was aware that, although it was a nonunion job, some of Respondent’s employees were affiliated with unions, that the employees retained their affiliations during his legal dispute over the disputed collective-bargaining agreement, and that he did not care. As to Waliser, William Martel stated, “the picket affected his opportunity to perform work for us on a day-to-day basis and be a steady employee. And that’s whether he belonged to the Klu Klux Klan or [the] Operating Engineers Union or whatever. That wasn’t the biggest issue. The biggest issue was for him to be there because we needed him.” Specifically, as to the working of the July 14 letter to Waliser, Martel stated that he wrote it in anticipation of further picketing by the unions, that he assumed the alleged discriminatee would continue to honor the picketing and refuse to work, that he meant to convey to Waliser the message that relinquishing his union affiliation “would make his life and my life a whole hell of a lot easier,” and that “if I had it to do over again, I would probably go into more detail and use other terms of why it would be beneficial to him to go to work every day.” Martel offered no explanation regarding his choice of work in his response to Waliser’s claim for unemployment compensation. Finally, with regard to its defense to the alleged terminations of Waliser and Williams, Respondent points out that the unions’ picketing occurred intermittently on July 13, 14, 18, 26, and 27 and on August 1–3 and 8–10 and that Waliser adamantly stated he would honor the picketing whenever it occurred.

Concerning Respondent’s defense that Waliser and Williams were economic strikers subject to permanent replacement, the record establishes that, notwithstanding the stated purpose of the picketing to protest Respondent’s unlawful conduct, Administrative Law Judge Jay Pollack dismissed the unfair labor practice allegations concerning Respondent’s refusal to execute a successor collective-bargaining agreement with the picketing unions; that both alleged discriminatees were replaced early in the week after the start of the picketing; and that, at least as to Waliser, there is record evidence as to Respondent’s need to do so. In that regard, as set forth above, Waliser was Respondent’s only crane operator on the Helena jobsite and, at the time the picketing commenced, it was scheduled to begin a concrete pour, for which job use of the Grove crane was essentially in order to hoist the concrete for the pour. No such record evidence exists as to the economic necessity for replacing Williams.

Finally, there is no dispute that Respondent mailed offers of reinstatement, dated July 28, to both Waliser and Williams. The offers, which were identical, read as follows:

The purpose of this letter is to clarify the position of Martel Construction with respect to your employment and to restate our unconditional offer of reemployment upon the same terms and conditions under which you were originally employed.

As you may know, Martel Construction is not signatory to any labor agreement and does not intend to become signatory unless required by law to do so. Consequently, no employee of Martel Construction is required to become or remain a member of any labor organization as a condition of employment. However, certain of Martel's employees have retained their membership in various labor organizations for whatever reasons they may have had for doing so. Martel has absolutely no objection to any of its employees voluntarily joining or continuing membership in any labor organization. Therefore, Martel will not make union membership or lack of same a condition of employment with our firm.

A basic requirement of employment is that you report for work and work each day as assigned. If your employment with Martel as a non-union or picketed firm creates some difficulties or conflicts in connection with your obligations as a union member, then it will be your sole responsibility to resolve any such difficulties or conflicts. Our only requirement is that you not allow those conflicts to interfere with your obligations to perform your assigned work as scheduled. If you participate in a strike against Martel, you will be subject to replacement and subsequent reinstatement only as allowed and required by law.

If you have any questions about our position, please contact me immediately. If you choose to accept reemployment, please immediately report to work no later than twenty-four (24) hours after receipt of this letter, or Friday, August 4, whichever occurs first. If you do not report by those deadlines, we will assume that you are no longer interested in working for our company.

Very sincerely yours,  
MARTEL CONSTRUCTION, INC.

As to the offer mailed to him, Respondent's Exhibit 15, Waliser testified that Respondent's registered letter arrived at his home after he had left Montana in order to find work elsewhere and that he first learned of its contents 4 days after his wife received the letter. He added that, given the reporting requirements of the offer, he chose not to respond. Williams testified that he first saw a copy of Respondent's offer of reinstatement to him, Respondent's Exhibit 16, at the Carpenters Union office on August 12. He acknowledged that it had been correctly addressed and speculated that his wife had received notice of attempted deliveries but had not informed him.

#### B. Analysis

In order to ascertain whether Respondent's conduct here constituted violations of Section 8(a)(1) and (3) of the Act, it is necessary to consider the credibility of the several witnesses. In this regard, I was impressed by the testimonial demeanor of both alleged discriminatees, Raymond Waliser and Robert Williams. Each was an honest and straightforward witness and shall be entirely credited here. Likewise, Anthony Martel, who was in Nevada during the events here, seemed to be a candid witness and, noting that his and Waliser's version of their July 13 telephone conversation are consistent, I shall credit his testimony. On the other hand, I was not favorably impressed by William Martel's demeanor while testifying and found his explanations for his motiva-

tions, generally, and for his July 14 letter to Waliser, in particular, rather unconvincing, strained, and at odds with the record as a whole. Accordingly, I shall not rely on his testimony in this matter. Finally, Clancy Gaworski exhibited the testimonial demeanor of an utterly disingenuous witness and his testimony shall be relied upon only to the extent corroborated by other, more trustworthy witnesses, or as to any admissions.

Initially, as to the merits of the instant consolidated complaint allegations, one is immediately confronted by Respondent's varying claims that the alleged discriminatees either "voluntarily" terminated their jobs with Respondent, were terminated for cause, or, as economic strikers, were permanently replaced on the Helena jobsite. Regarding the first, any assertion that either man quit working for Respondent must be deemed without merit. Thus, there is no dispute that Waliser and Williams were strikers, and, approximately 40 years ago, the Board held that an employee's "failure to work during the pendency of a strike cannot be construed as a termination of employment." *United States Cold Storage Corp.*, 96 NLRB 1108, 1109 (1951). The more vexing issue is whether Respondent terminated the alleged discriminatees or permanently replaced them as economic strikers.<sup>14</sup> "The Board has recognized that it is sometimes difficult to determine whether an employer . . . has discharged strikers . . . [unlawfully] or has lawfully replaced them. Each case requires a careful examination of the facts." *C & W Mining Co.*, 248 NLRB 270, 272-273 (1980); *Lipsey, Inc.*, 172 NLRB 1535, 1547 (1968). In this regard, while neither the choice of words nor the timing of the employer's actions may be decisive, the employer apparently must show it acted "only to preserve efficient operation of [its] business" and "only so it could immediately . . . replace them with others willing to perform the scheduled work." *Lipsey, Inc.*, supra; *Redwing Carriers*, 137 NLRB 1545, 1547 (1962). That Respondent meant to, and did, discharge Robert Williams, and not merely replace him, seems clear. Thus, Clancy Gaworski admitted that, on Friday, July 14, on learning that the alleged discriminatee again failed to cross the picket line at the Helena project and work, he made the decision to terminate Williams. Moreover, on the next day, the latter received, by mail, two checks from Respondent, including one for the last, partial week of work. Further, there is not a scintilla of record evidence that replacing Williams was a factor in Gaworski's decision or was necessary for Respondent's continued "efficient operations at the Federal reserve bank building construction project." In these circumstances, I conclude that Williams was discharged rather than permanently replaced.

Turning to whether Raymond Waliser had been terminated or permanently replaced as an economic striker, while there exists ample record evidence as to Waliser being the only crane operator employed by Respondent on the Federal reserve bank building construction jobsite at the start of the

<sup>14</sup> Waliser and Williams each credibly testified that he honored the picket line which was established by his own and the other unions involved in the dispute with Respondent over the execution of a new collective-bargaining agreement. Thus, the alleged discriminatees were, at once primary and sympathy strikers. While the record establishes that the purpose of the strike was to protect alleged unfair labor practices, the ruling of the administrative law judge that Respondent engaged in no such unlawful conduct transformed the concerted activity to an economic strike and Waliser and Williams to economic strikers. *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976).

picketing and to the necessity for utilizing the Grove crane during the scheduled concrete pour, the record, as a whole, warrants the inference that Respondent discharged the alleged discriminatee rather than permanently replaced him. At the outset, in this regard, I note that, at no time prior to the instant hearing did Respondent ever assert that Waliser had been permanently replaced as an economic striker; rather, in its response to Waliser's claim for unemployment compensation and its answer to the instant consolidated complaint, Respondent's consistent position was that Waliser had "voluntarily terminated" his employment by honoring the picket line at the Helena jobsite. Further, having been advised by Waliser that he would not cross the picket line and assertedly upset that Waliser had thereby left him "short handed," Clancy Gaworski admittedly decided, on Friday, July 14, to terminate Waliser. Inasmuch as his missing a second consecutive day of work constituted "strike two" against Waliser, it seems clear that Gaworski's concern was discipline for Waliser's perceived misconduct rather than the replacement of an indispensable employee. That this view is correct may best be seen in light of the events of Monday, July 17. Thus, referring to William Martel's July 14 letter, which Waliser had not yet seen, Gaworski conditioned the former's continued employment on not affiliating with a union, saying "so long as I wanted to stay with the unions, there was no work." Waliser refused to relinquish his union card, and Gaworski admitted that, during their conversation, he informed the alleged discriminatee that he was terminated. Of course, the employment condition, imposed upon the employee by Gaworski, was patently violative of Section 8(a)(1) of the Act. *Schmidt-Tiago Construction Co.*, 286 NLRB 342, 358 (1987); *Randle-Eastern Ambulance Service*, 230 NLRB 542, 542 at fn. 2 (1977). William Martel's July 14 letter, which Waliser received later that morning, set forth the identical condition, making Waliser's continued employment "contingent upon a non-affiliation with any union,"<sup>15</sup> and, likewise, must be found unlawful. Finding Gaworski's admission, that he terminated Waliser, as fact leads me to the inevitable conclusion, supported by the record as a whole, that, during his Monday afternoon telephone conversation with the alleged discriminatee, Martel did no more than offer reinstatement to the former. However, inasmuch as Martel admittedly failed to either mention the letter or say anything to repudiate his above-described unlawful condition on Waliser's continued employment, it would be utterly repugnant to the policies and purposes of the Act to find that Martel's offer, which Waliser rejected, had the effect of vitiating the termination and, thus, transforming Respondent's act into merely that of permanently replacing Waliser. Ac-

<sup>15</sup> That Martel's condition, set forth in the July 14 letter, was repeated by Gaworski on July 17 and by Martel himself in his response to Waliser's unemployment claim renders his assertion, that he was merely pointing out that resigning from his union would enable Martel to work without fear of the consequences of crossing a picket line, absurd. What the three statements clearly establish is that Respondent would no longer tolerate Waliser's membership in the Operating Engineer's Union, which heretofore had not interfered with the employment relationship. Accordingly, I do not accept William Martel's self-serving communications to his employees nor his assurances at the hearing that his employees' union affiliations were not a concern. As will be shown infra, once Williams and Waliser exercised their rights guaranteed by Sec. 7 of the Act, their union membership became a concern to William Martel and Clancy Gaworski.

cordingly, based on the foregoing, I find that both Williams and Waliser were, in fact, terminated by Respondent.

The determination of the legality of the discharges of Williams and Waliser is governed by the traditional precepts of Board law in 8(a)(1) and (3) discharge cases, as modified by the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 453 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Thus, in order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish (1) that the alleged discriminatees engaged in union activities; (2) that the employer had knowledge of such; (3) that the employer's actions were motivated by union animus; and (4) that the discharges had the effect of encouraging or discouraging membership in a labor organization. *WMUR-TV*, 253 NLRB 697, 703 (1980). Further, the General Counsel has the burden of proving the aforementioned by a preponderance of the evidence. *Gonic Mfg. Co.*, 141 NLRB 201, 209 (1963). While the aforementioned analysis was easily applied in cases in which the employer's motivation was straightforward, conceptual problems arose in cases in which the record evidence disclosed the presence of both a lawful cause and an unlawful cause for the discharge. In order to resolve this ambiguity, in *Wright Line*, supra, the Board established the following causation test in all 8(a)(1) and (3) cases involving employer motivation. "First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. at 1089. Two points are relevant to the foregoing analytical approach. First, in concluding that the General Counsel has established a prima facie violation of the Act, the Board will not "quantitatively analyze" the effect of the unlawful motive. The existence of such is sufficient to make a discharge a violation of the Act. Id. at 1089. fn. 14. Second, pretextual discharge cases should be viewed as those in which "the defense of business justification is wholly without merit" (id. at 1084 fn. 5), and the "burden shifting" analysis of *Wright Line* need not be utilized. *Arthur Young & Co.*, 291 NLRB 39 (1988). The terminations of Waliser and Williams, I believe, are of the latter type and patently unlawful.

That Robert Williams and Raymond Waliser each honored his union's picket line at Respondent's Federal reserve bank building construction project in Helena on July 13 and 14 and, as a result, did not report for work is not in dispute. I have previously concluded that, given the dismissal of its unfair labor practice allegations pertaining to Respondent's refusal to execute a successor collective-bargaining agreement, the Union's picketing on the above dates must legally be considered as being economic in nature (*Crystal Princeton Refining Co.*, supra), and there is no contention by Respondent that such was for an unlawful purpose or unprotected in any way. "The Board has long held that an employee who chooses to honor a picket line emanating from a protected primary strike is engaging in protected concerted activity." *Savage Gateway Supermarket*, 286 NLRB 180, 183 (1987); *Lipsey, Inc.*, 172 NLRB 1535 (1968); *Cooper Thermometer Co.*, 154 NLRB 502, 503 (1965). Therefore,

Williams and Waliser each engaged in protected concerted activities by honoring the Union's picketing at the above dates. Moreover, it is manifestly certain that Respondent was fully cognizant as to why neither employee reported for work on Thursday and Friday. Thus, there is no dispute that Clancy Gaworski and Anthony Martel spoke to Waliser during the 2 days or that he informed both that he would not cross the Operating Engineers' picket line into the bank building construction site, and Gaworski admitted being aware, from the outset of the picketing on July 13, that Williams, likewise, was honoring the carpenters union picketing and refusing to work. Further, there is ample record evidence to justify the General Counsel's contention that the discharges of Waliser and Williams were directly related to and motivated by, their respective honoring of the picket line. As to Williams, having terminated him on July 14, Gaworski told him on the following Monday that Williams was "better off" with an employer than with his union, that the Helena project was "a non-union project," and that "union people should be on union jobs." Given Gaworski's knowledge that Williams had supported his union by honoring its primary picketing at the Helena jobsite, there is ample record evidence justifying the conclusion that Respondent's discharge of Williams directly resulted from his foregoing activity and was violative of Section 8(a)(1) and (3) of the Act. With regard to Waliser, the evidence of Respondent's unlawful motivation is demonstrably clearer. Thus, I have previously concluded that the alleged discriminatee was terminated by Gaworski during their conversation on Monday morning, July 17, and that the employment condition, set forth in William Martel's July 14 letter and reiterated by Gaworski on July 17, which required Waliser to relinquish his union membership in order to continue working for Respondent, was blatantly violative of Section 8(a)(1) of the Act. Waliser refused to do so, and Gaworski admittedly terminated him. As with Williams, given Respondent's knowledge that Waliser was honoring his union's picket line at the Helena jobsite and in light of the unlawful employment condition imposed upon him by Respondent, there is sufficient record evidence to establish a prima facie violation of Section 8(a)(1) and (3) of the Act as to the termination of Waliser.

Contrary to the foregoing analysis, Respondent argues that neither Waliser nor Williams engaged in protected concerted activity inasmuch as employees who engage in partial or intermittent strikes are not protected from discharge. However, while the Board has long held that employees who engage in intermittent or partial strikes are not protected by Section 7 of the Act (*Audubon Health Care Center*, 268 NLRB 135, 136 (1983); *First National Bank of Omaha*, 171 NLRB 1145 (1968)), one could so characterize the nature of the strike conduct here only if Respondent had waited until the final day of picketing to discharge Williams and Waliser. The facts here are that Gaworski reached his decision to discharge the alleged discriminatees after the initial 2 days of picketing and at a time when such had occurred on consecutive days and was neither intermittent nor partial.<sup>16</sup> Further, based upon the above credited testimony, it appears that the alleged discriminatees' support for their respective unions,

which manifested itself in the honoring of the picket lines, rather than the extent of their strike was Respondent's motivating factor in discharging them.

Respondent next argues that there exists insufficient evidence to establish that it was unlawfully motivated in terminating Williams or Waliser. In this regard, counsel for Respondent points out that William Martel was fully aware of Waliser's union membership and utilized him on several nonunion jobs, that Martel "pleaded" with Waliser to remain on the Federal reserve bank building job, that Respondent's history was that of a union company, and that other union employees crossed the picket line and continued working on the above jobsite. Contrary to counsel, and notwithstanding William Martel's protestations of having no antiunion animus, which I do not credit, I believe the record evidence conclusively establishes that Respondent was unlawfully motivated in discharging Waliser and Williams. At the outset, the record makes it certain that, while Respondent may well have tolerated union employees on the Helena jobsite, active union supporters such as Williams and Waliser were another matter. Thus, Anthony Martel was concerned that Waliser suddenly would change his tune and was no longer a good company man. However, most significant in my view, are William Martel's own words as set forth in this application for unemployment compensation. Denying the plain meaning of his language, Martel asserted that he actually meant to convey to Waliser a suggestion that he resign from the Operating Engineers Union so that he could freely exercise his right not to honor the picket line and to resume working. This assertion, I believe, constituted an utter canard. Thus, not only did Martel fail to explain what he meant by his words when he spoke to Waliser in the afternoon of July 17 but also Clancy Gaworski reiterated the unlawful employment condition during his conversation with Waliser that morning and Martel himself wrote in response to the employee's unemployment claim that Waliser "was given an opportunity to continue working for [Respondent] . . . without any union affiliation" and "he refused to work under that policy." Martel offered no explanation for his latter choice of language. Furthermore, with regard to Williams, Gaworski conceded telling the employee on July 17 the the Federal reserve bank building project was "a non-union job" and "union men [wouldn't] want to work for us." Such gratuitous comments and his comments to Waliser belie his assertion that his sole concern were the two strikes against each alleged discriminatee for missing work on the previous Thursday and Friday.<sup>17</sup>

Based on the foregoing and the record as a whole, the conclusion is warranted, indeed mandated, that the alleged discriminatees were terminated by Respondent because each elected to support his labor organization by honoring its picket line at the Helena jobsite. Whatever tolerance Respondent may have had for union employees on this project clearly did not extend to such explicit and overt support, as engaged in by Waliser and Williams, for their respective and overt support, as engaged in by Waliser and Williams, for their respective labor organizations. The Board has long held that such conduct, as engaged in by Respondent, is patently

<sup>16</sup> Assuming arguendo that Respondent may well have anticipated that the picketing would continue, there was no basis, on July 14, for it to have concluded that the picketing, and resultant strike by Waliser and Williams, would have been intermittent in nature.

<sup>17</sup> While Gaworski asserted that he gave Respondent's two employees two strikes or absences before terminating them, there is no evidence that such was a specific work rule or that such had ever been communicated to the alleged discriminatees.

violative of Section 8(a)(1) and (3) of the Act, and I so find. *Savage Gateway Supermarket*, supra; *C & W Mining Co.*, supra; *Overnite Transportation Co.*, 154 NLRB 1271 (1965); *Cooper Thermometer Co.*, 154 NLRB 502 (1965).<sup>18</sup>

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Carpenters Union and the Operating Engineers Union labor organizations within the meaning of Section 2(5) of the Act.

3. By terminating employees Robert Williams and Raymond Waliser on July 14 and 17, respectively, because they supported their respective labor organizations by honoring picket lines at Respondent's Helena, Montana Federal reserve bank building construction jobsite, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

5. Respondent's unfair labor practices affect commerce within the meaning of Section 8(a)(1) of the Act.

#### REMEDY

Having found that Respondent engaged in serious unfair labor practices violative of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist from such conduct and to take certain affirmative action designed to ef-

fectuate the purposes and policies of the Act. I have concluded that Respondent unlawfully terminated employees Robert Williams and Raymond Waliser on July 14 and 17, 1989, respectively, because each supported his labor organization by honoring a picket line at Respondent's Helena jobsite. Accordingly, I shall recommend that Respondent be ordered to reinstate each to his former position of employment or to a substantially equivalent one if such no longer exists. Further, I shall recommend that Respondent be ordered to make Williams and Waliser whole for any lost earnings each may have suffered as a result of the unlawful discrimination practiced against him as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Isis Plumbing Co.*, 138 NLRB 710 (1962), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>19</sup> Additionally, I shall recommend that Respondent be ordered to post a notice, setting forth its obligations.

[Recommended Order omitted from publication.]

<sup>19</sup> Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set forth in the 1986 amendment to 26 U.S.C. § 6621. I find that the July 28 reinstatement offers were not adequate to stop Respondent's backpay obligations as to either Williams or Waliser. Thus, both offers required the alleged discriminatees to accept reemployment no later than 24 hours after receipt of the offer or Friday, August 4, whichever came first and added that "if you do not report by those deadlines, we will assume that you are no longer interested in working for our company." The Board has recently held that a reinstatement offer is invalid "if the letter on its face makes it clear that reinstatement is dependent upon the employee's returning on the specified date or the letter otherwise suggests that the offer will lapse if a decision on reinstatement is not made by that date." *Esterline Electronics Corp.*, 290 NLRB 834 (1988). The offers to Williams and Waliser fall within this ruling and must both be considered as invalid.

<sup>18</sup> As a further indicia supportive of my conclusion as to Respondent's unlawful motivation, I note the shifting nature of Respondent's defenses, as discussed, supra. *Goren Printing Co.*, 284 NLRB 30 (1987); *P\*I\*E Nationwide, Inc.*, 282 NLRB 1060, 1064 (1987).